SARAVANAN RAJAGOPAL & ANOR v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
ABDUL RAHMAN SEBLI JCA
KAMARDIN HASHIM JCA
[CRIMINAL APPEALS NO: A-05(M)-274-07-2017
& A-05(M)-276-07-2017]
10 JANUARY 2019

CRIMINAL LAW: *Murder – Conviction and sentence – Appeal against – Whether prosecution witness an interested witness – Whether mere bystander – Whether witnesses of truth and entitled to credence – Whether witnesses witnessed commission of offence – Whether evidence of witnesses supported by other evidence – Penal Code, s. 302*

CRIMINAL LAW: *Murder – Conviction and sentence – Appeal against – Common intention – Whether second accused person acted in concert with first accused person in furtherance of common intention to murder deceased – Link between weapon used by first accused person and conduct of second accused person – Whether established – Whether there was evidence of participation of second accused person*

CRIMINAL PROCEDURE: *Trial – Recall of witnesses – Power of court – Whether discretionary in nature – Basis for exercise of discretion – Whether additional evidence from witness to be recalled essential to decision of case – Whether there was basis for exercise of discretionary to recall witness – Whether prior testimonies of witnesses sufficiently comprehensive and competently executed – Criminal Procedure Code, s. 425*

CRIMINAL PROCEDURE: *Defence – Counsel – Court appointed counsel in criminal trial involving capital offence – Application to discharge himself – Court's refusal to allow application to recall witness – Whether ground for discharge*

The appellants were charged individually under s. 302 of the Penal Code read with s. 34 of the same Act for the murder of the deceased. The prosecution relied on the evidence of SP1 and SP2 to prove its case. SP1, together with the first and second appellants were allegedly at a restaurant when SP2 joined them. While in the restaurant, SP1 saw the deceased, his former employer, circling the area in a white Proton Waja. Subsequently, the deceased was again seen circling the area on a motorcycle. At this juncture, the first appellant borrowed SP1's motorcycle and left the restaurant with the second appellant. When they arrived about ten minutes later, SP1 noticed a badminton bag in the carrier of his motorcycle. Upon seeing the deceased entering a hardware shop, a few shops away from the restaurant, the appellants left the restaurant on SP1's motorcycle and proceeded towards the direction of the hardware shop. Shortly thereafter, SP1 saw the deceased

running into the restaurant shouting for help, being pursued by the first appellant wielding a parang with a long blade. The deceased exited the restaurant through the back door into the back lane and the second appellant also was seen riding the motorcycle and went past the restaurant towards the back lane. SP1, together with SP2, rushed to the back lane and saw the first appellant striking two blows at the deceased on his hand with the parang, whilst the second appellant sat on the motorcycle and watched the attack. SP1 stated that he and SP2, having been panicked, left the restaurant. In cross-examination, SP1 admitted that prior to the murder, there had been an incident involving the smashing of the windscreen of the car of the deceased by both the appellants and others aligned to the appellants. The deceased blamed SP1 for the incident and terminated his employment a few days later. SP2's testimony was on all fours with the testimony of SP1. The Judicial Commissioner ('JC') found the evidence of SP1 and SP2 was not shaken or broken in any way and, based on their evidence, found that it was established that it was the first appellant who had slashed the deceased to death in furtherance of the common intention between him and the second appellant. At the conclusion of the trial, the JC found both the appellants failed to raise a reasonable doubt upon the prosecution's case and the prosecution had proven its case beyond a reasonable doubt. Both the appellants were convicted of the offence and were consequently sentenced to death in accordance with s. 277 of the Criminal Procedure Code ('CPC'). The appellants' appeal herein were in respect of their convictions and sentences. The grounds of appeal raised by the first appellant were that: (i) the JC erred in declining to allow application by his counsel to recall SP1 and SP2 under s. 425 of the CPC and upon such refusal further declined the application by counsel to discharge himself from representing the first appellant; (ii) the JC erred in finding that the badminton bag, which was brought to the restaurant when both the appellants returned to the restaurant on SP1's motorcycle, contained the parang that was used to slash the deceased when in fact no evidence was adduced to indicate what was inside the bag; and (iii) SP1 was an interested witness and therefore unworthy of credit. The second appellant premised his appeal principally upon the want of evidence that the first appellant had slashed the deceased in furtherance of the common intention between him and the second appellant under s. 34 of the Penal Code.

Held (dismissing first appellant's appeal and allowing second appellant's appeal; affirming conviction and sentence of first appellant and setting aside conviction and sentence of second appellant and substituting it with an order of acquittal and discharge)

Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The powers conferred to the court under s. 425 of the CPC, in particular, to recall and re-examine a witness already examined is discretionary in nature. The basis for the exercise of the discretion is essentiality of the additional evidence of the recalled witness to the just decision of the case. Counsel for the first appellant did not proffer any

grounds upon the need to recall SP1 and SP2 nor indicate the essentiality of the additional evidence of SP1 and SP2 upon recall to the just decision of the case. Counsel even declined to reveal the purported questions he intended to ask SP1 and SP2 on grounds of secrecy. Hence, the JC did not err when she refused the application by counsel to recall SP1 and SP2 as she was devoid of any basis to exercise her discretion in favour of the first appellant. In fact, the testimonies given by SP1 and SP2 were sufficiently comprehensive and competently executed by both the prosecution and the defence. (paras 60 & 62-64)

(2) The refusal by the JC to allow the application by the first appellant's counsel to recall and re-examine SP1 and SP2 was not a ground for counsel to discharge himself of his duties upon his appointment by the court to act as counsel for the first appellant. The JC had aptly applied the terms of the circular regulating the appointment and conduct of counsel appointed by court in a criminal trial involving capital offence. (para 69)

(3) There was no evidence adduced that the badminton bag brought by both the appellants to the restaurant contained the parang that was used to slash the deceased. In the circumstances, the finding by the JC that the parang used to slash the deceased was brought by both the appellants to the restaurant was erroneous and therefore could not be sustained. Nevertheless, it did not detract the fact that the deceased was slashed by the first appellant using a parang. He was seen slashing the deceased with a parang by both SP1 and SP2 and their evidence was amply supported by the medical evidence. (paras 75, 76 & 79)

(4) SP1 was not an interested witness. He was a mere bystander who witnessed the commission of the offence perpetrated by the first appellant and who happened to be in the company of both the appellants and SP2 before the offence was committed. There was no evidence to connect SP1 with the slashing of the deceased to death. The blaming of SP1 for the incident involving smashing of the windscreen of the deceased's car and the subsequent termination of his employment was too trivial and remote a matter to propel him to undertake such a horrifying revenge against the deceased. (paras 85-88)

(5) Even if SP1 was an interested witness, he was still entitled to credence until cogent reason for disbelief could be advanced and admitted to prove otherwise. There is no legal presumption that an interested witness should not be believed. Though the authorities suggested that the evidence of an interested witness must be treated with caution, there is no rule of law requiring the trial judge to caution himself and make a specific ruling on the credibility of such witness. The JC was satisfied

that SP1 and SP2 were witnesses of truth and accordingly, there was no reason for this court to reject the evidence of SP1 and SP2 or to treat their evidence with suspicion. (paras 89, 91 & 92)

(6) There was no link between the parang used by the first appellant in the commission of the offence with the act or conduct of the second appellant to indicate the second appellant's participation of the crime. Also, there was no evidence that the second appellant had assisted the first appellant to flee the scene or how the first appellant had fled. As such, there was no evidence to suggest that the second appellant had acted in concert with the first appellant in furtherance of their common intention to murder the deceased by assisting the first appellant to flee the scene. In the circumstances, the conviction and sentence against the second appellant was set aside and substituted with an order of acquittal and discharge. (paras 96-98)

Bahasa Malaysia *Headnotes*

Perayu-perayu dituduh berasingan bawah s. 302 Kanun Keseksaan dibaca bersama-sama dengan s. 34 Akta sama kerana membunuh si mati. Pihak pendakwaan bersandar pada keterangan SP1 dan SP2 untuk membuktikan kesnya. SP1 bersama-sama dengan perayu pertama dan perayu kedua dikatakan berada di sebuah restoran apabila SP2 menyertai mereka. Semasa dalam restoran, SP1 nampak si mati, majikan lamanya, berlegar-legar di kawasan itu dalam kereta Proton Waja putih. Kemudian, si mati sekali lagi dilihat berlegar-legar di kawasan itu menunggang sebuah motosikal. Ketika itu, perayu pertama meminjam motosikal SP1 dan meninggalkan restoran dengan perayu kedua. Apabila mereka tiba sepuluh minit kemudian, SP1 nampak sebuah beg badminton dalam bakul motosikalnya. Selepas melihat si mati memasuki sebuah kedai perkakasan, selang beberapa kedai daripada restoran itu, perayu-perayu meninggalkan restoran dengan motosikal SP1 dan pergi ke arah kedai perkakasan itu. Sejurus selepas itu, SP1 nampak si mati berlari ke dalam restoran sambil meminta tolong, dan dikejar oleh perayu pertama dengan parang berbilah panjang di tangannya. Si mati keluar dari restoran melalui pintu belakang ke lorong belakang dan perayu kedua dilihat menunggang motosikal itu dan melepasi restoran ke arah lorong belakang. SP1 bersama-sama dengan SP2 meluru ke lorong belakang dan nampak perayu pertama menetak si mati pada tangannya dua kali menggunakan parang itu, sementara perayu kedua duduk atas motosikal itu dan memerhatikan serangan tersebut. SP1 menyatakan bahawa dia dan SP2, menjadi panik dan meninggalkan restoran itu. Dalam pemeriksaan balas, SP1 mengakui bahawa sebelum pembunuhan itu, terdapat satu insiden berkaitan memecahkan tingkap kereta si mati oleh kedua-dua perayu dan yang lain yang bersepakat dengan perayu-perayu. Si mati menyalahkan SP1 atas

insiden itu dan menamatkan pekerjaannya beberapa hari kemudian. Keterangan SP2 sama seperti keterangan SP1. Pesuruhjaya Kehakiman ('PK') mendapati keterangan SP1 dan SP2 tidak goyah atau terputus dalam apa-apa cara sekalipun dan berdasarkan keterangan mereka, mendapati terbukti bahawa perayu pertama yang menetak si mati sehingga mati dalam lanjutan niat bersama-sama antara dia dan perayu kedua. Di penghujung perbicaraan, PK mendapati kedua-dua perayu gagal membangkitkan keraguan munasabah atas kes pendakwaan dan pendakwaan berjaya membuktikan kes melampaui keraguan munasabah. Kedua-dua perayu disabitkan atas kesalahan tersebut dan dengan itu dijatuhkan hukuman mati menurut s. 277 Kanun Tatacara Jenayah ('KTJ'). Rayuan perayu-perayu di sini adalah berkaitan dengan sabitan dan hukuman. Alasan rayuan yang dibangkitkan perayu pertama adalah bahawa: (i) PK terkhilaf apabila enggan membenarkan permohonan peguamnya memanggil semula SP1 dan SP2 bawah s. 425 KTJ dan selepas penolakan itu, selanjutnya menolak permohonan peguam menarik diri daripada mewakili perayu pertama; (ii) PK terkhilaf apabila mendapati beg badminton, yang dibawa ke restoran apabila kedua-dua perayu kembali ke restoran dengan motosikal SP1, mengandungi parang yang digunakan untuk menetak si mati apabila, tiada keterangan dikemukakan yang menunjukkan apa-apa dalam beg itu; dan (iii) SP1 ialah saksi berkepentingan dan, oleh itu, tidak boleh dipercayai. Perayu kedua mendasarkan rayuannya, pada asasnya, atas ketiadaan keterangan bahawa perayu pertama telah menetak si mati dalam lanjutan niat bersama antaranya dengan perayu kedua bawah s. 34 Kanun Keseksaan.

Diputuskan (menolak rayuan perayu pertama dan membenarkan rayuan perayu kedua; mengesahkan sabitan dan hukuman perayu pertama dan mengetepikan sabitan dan hukuman perayu kedua dan menggantikannya dengan perintah pelepasan dan pembebasan)

Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Kuasa yang diberi kepada mahkamah bawah s. 425 KTJ, khususnya, untuk memanggil semula dan memeriksa semula saksi yang telah diperiksa bersifat kuasa budi bicara. Asas pelaksanaan budi bicara adalah kepentingan keterangan tambahan daripada saksi yang dipanggil semula untuk keadilan keputusan kes tersebut. Peguam perayu pertama tidak mengemukakan apa-apa alasan memanggil semula SP1 dan SP2 atau menyatakan kepentingan keterangan tambahan SP1 dan SP2 dipanggil semula untuk keadilan keputusan kes tersebut. Malahan, peguam enggan mendedahkan soalan-soalan yang akan ditanya pada SP1 dan SP2 atas alasan rahsia. Oleh itu, PK tidak terkhilaf apabila menolak permohonan peguam untuk memanggil semula SP1 dan SP2 kerana tiada asas untuk beliau melaksanakan budi bicara berpihak pada perayu pertama. Sebenarnya, keterangan oleh SP1 dan SP2 cukup komprehensif dan dikemukakan secara kompeten oleh kedua-dua pihak pendakwaan dan pembelaan.

(2) Keengganan PK membenarkan permohonan peguam perayu pertama untuk memanggil semula dan memeriksa semula SP1 dan SP2 bukan alasan untuk peguam menarik diri daripada tugas-tugasnya setelah dilantik mahkamah untuk bertindak sebagai peguam bagi pihak perayu pertama. Pesuruhjaya Kehakiman mengaplikasi dengan cekap terma-terma pekeliling yang melaraskan pelantikan dan tindakan peguam yang dilantik mahkamah dalam perbicaraan jenayah melibatkan kesalahan hukum bunuh.

(3) Tiada keterangan dikemukakan bahawa beg badminton yang dibawa oleh kedua-dua perayu ke restoran mengandungi parang yang digunakan untuk menetak si mati. Dalam keadaan tersebut, dapatan PK bahawa parang yang digunakan untuk menetak si mati dibawa oleh kedua-dua perayu ke restoran adalah khilaf dan dengan itu tidak boleh dipertahankan. Walau bagaimanapun, ini tidak menjejaskan fakta bahawa si mati ditetak oleh perayu pertama menggunakan parang. Perayu pertama dilihat menetak si mati dengan parang oleh kedua-dua SP1 dan SP2 dan keterangan mereka disokong penuh dengan keterangan perubatan.

(4) SP1 bukan saksi berkepentingan. Dia hanya berada di tempat kejadian dan menyaksikan perlakuan kesalahan oleh perayu pertama dan orang yang bersama-sama dengan perayu-perayu dan SP2 sebelum kesalahan dilakukan. Tiada keterangan untuk melibatkan SP1 dengan penetakan si mati hingga mati. SP1 dipersalahkan untuk insiden melibatkan tindakan memecahkan cermin kereta si mati dan penamatan kerjanya selepas itu adalah perkara yang terlalu remeh dan terasing untuk mendorongnya membalas dendam secara yang mengerikan terhadap si mati.

(5) Walaupun SP1 adalah saksi berkepentingan, dia masih berhak dipercayai sehingga alasan munasabah untuk tidak boleh dipercayai dikemukakan dan diterima masuk untuk membuktikan sebaliknya. Tiada anggapan undang-undang bahawa saksi berkepentingan tidak boleh dipercayai. Walaupun autoriti-autoriti mencadangkan bahawa keterangan saksi berkepentingan mesti diterima dengan berhati-hati, tiada undang-undang yang memerlukan hakim bicara memberi amaran kepada dirinya sendiri dan membuat arahan spesifik tentang kebolehpercayaan saksi sedemikian. Pesuruhjaya Kehakiman berpuas hati bahawa SP1 dan SP2 adalah saksi-saksi benar dan dengan itu, tiada sebab untuk mahkamah menolak keterangan SP1 dan SP2 atau menerima keterangan mereka dengan keraguan.

(6) Tiada kaitan antara parang yang digunakan oleh perayu pertama untuk melakukan kesalahan itu dengan tindakan atau kelakuan perayu kedua untuk menunjukkan penglibatan perayu kedua dalam jenayah itu. Selain itu, tiada keterangan bahawa perayu kedua membantu perayu pertama

melarikan diri dari tempat kejadian atau bagaimana perayu pertama melarikan diri. Oleh itu, tiada keterangan yang mencadangkan bahawa perayu kedua bertindak bersama-sama dengan perayu pertama dalam lanjutan niat bersama untuk membunuh si mati dengan membantu perayu pertama melarikan diri dari tempat itu. Dalam keadaan tersebut, sabitan dan hukuman terhadap perayu kedua diketepikan dan digantikan dengan perintah pelepasan dan pembebasan.

Case(s) referred to:
Adiswaran Tharumaputrintar v. PP & Other Appeals [2014] 3 CLJ 813 FC ***(refd)***
Balasingham v. PP [1959] 1 LNS 8 HC ***(refd)***
Kumaran Sappani v. PP [2011] 3 CLJ 251 FC ***(refd)***
Lim Boon San v. PP [1967] 1 LNS 86 HC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
PP v. Abdul Hamid [1968] 1 LNS 98 HC ***(refd)***
PP v. Phon Nam [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142 SC ***(refd)***
Rozmi Yusof v. PP [2013] 4 CLJ 384 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 425
Penal Code, ss. 34, 277, 302

For the 1st appellant - Hisham Nazir; M/s Hisham Nazir & Co
For the 2nd appellant - Geetham Ram, Lavanyia Raja & Charan Singh Kartar Singh; M/s Geethan Ram
For the respondent - Norinna Bahadun; DPP

[Editor's note: For the High Court judgment, please see PP v. Saravanan Rajagopal & Anor [2017] 1 LNS 1010 (overruled in part).]

Reported by S Barathi

JUDGMENT

Ahmadi Asnawi JCA:

[1] The appellants were charged individually on separate dates, with two different case numbers, with the murder of the deceased, one Gobinathan a/l Kumaravellu, under s. 302 of the Penal Code ('PC') read with s. 34 of the same. The charge against each of them was identical.

[2] On the application of the learned Deputy Public Prosecutor ('DPP'), the charges against both the appellants were heard together. The charge (as against the first appellant) reads:

> Bahawa kamu, bersama-sama (1) rakan bersama Ganesan a/l Kupusamy No. K.P 700217-08-5293 pada 5 Julai 2015 jam lebih kurang 12.00 tengah hari hingga 1.00 petang di belakang Restoren Nashmeer, Laluan Klebang Restu 2, Medan Klebang Restu, Chemor, Ipoh, Perak, dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, telah melakukan pembunuhan dengan menyebabkan kematian ke atas Gobinathan a/l

A Kumaravellu No. K.P 710905-08-6221 dan oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

[3] At the conclusion of the trial, both the appellants were convicted of the offence and were consequently sentenced to suffer the death penalty in B accordance with s. 277 of the Criminal Procedure Code ('CPC').

[4] The appeals by both appellants were in respect of their convictions and sentences.

[5] We heard their appeals and at the end of the hearing, after due C consideration of the issues raised and submissions made by both the parties, we dismissed the first appellant's appeal and correspondingly though allowed the second appellant's appeal. We now offer our grounds.

Case For The Prosecution

[6] The prosecution relied on the evidence of SP1 (Kesavan a/l D Gurappan) and SP2 (Anberson a/l Mathiyalagan) to prove its case.

[7] SP1 testified that on the morning of 5 July 2015, he picked up the first appellant from his house using his motorcycle, number AJE 2672, and took him to Nashmeer Restaurant in Klebang Restu, Ipoh (as indicated in the E charges). While there, SP1 further obliged the second appellant's request through the mobile phone to pick him up and bring him to the restaurant from a petrol station, located about 5 minutes away from the said restaurant. All the three of them allegedly were at the restaurant to meet a scrap metal dealer.

F **[8]** Soon after, SP1's friend, SP2, joined them at the table.

[9] The deceased (Gobinathan a/l Kumaravellu) was SP1's former employer.

[10] SP1 next saw the deceased circling the area in a white Proton Waja.

G **[11]** Still later, the deceased was again seen circling the area, now on a motorcycle.

[12] At this juncture, the first appellant then borrowed SP1's motorcycle and left the restaurant with the second appellant.

H **[13]** About 10 minutes later both the appellants came back to the restaurant. SP1 now noticed a badminton bag in the carrier of his motorcycle.

[14] Meanwhile the deceased was seen entering a hardware shop, a few shops away from the restaurant.

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[15] Both the appellants then left the restaurant, again using SP1's motorcycle and proceeded towards the direction of the hardware shop.

[16] Shortly thereafter, SP1 saw the deceased running into the restaurant shouting for help, being pursued by the first appellant wielding a parang with a long blade. The deceased exited the restaurant through the back door into the back lane. SP1 also saw the second appellant riding his motorcycle and went past the restaurant towards the back lane.

[17] SP1 further testified that he, SP2 and others who were in the restaurant rushed to the back lane to see what was happening. He saw the first appellant strike two blows on the deceased hand with the parang, whilst the second appellant sat on the motorcycle and watched the attack. SP1 added that he and SP2 panicked and left the restaurant within 5 minutes of the incident and proceeded to SP2's house at Sungai Siput.

[18] SP1 admitted in cross-examination that three weeks before the deceased's murder, the first and second appellants had visited SP1 at Indah Water Seri Klebang where SP1 had worked there as a security guard for the deceased. This had angered the deceased who then parked his car in front of the second appellant's lorry to prevent him from entering the place. Both the appellants and few others reacted by smashing the deceased's car windscreen. The deceased escaped by running out of his car.

[19] The deceased blamed SP1 for the incident and terminated his employment a few days later.

[20] The testimony of SP2 was on all fours with the testimony of SP1. He corroborated SP1's evidence that it was the first appellant who had slashed the deceased and that the second appellant watched the incident, seated on SP1's motorcycle. It was not put to SP2 though that it was he and SP1 who had jointly slashed the deceased as put to SP1. Instead, it was put to SP2 that only SP1 had slain the deceased.

[21] The thrust of the first appellant's defence as put to SP1 was that the first appellant was not involved in the murder of the deceased and that the deceased was slashed by both SP1 and SP2. It was also put to SP1 that he was at the restaurant on that day to meet the deceased whom he (SP1) had earlier messaged to meet him there and that his (SP1) intention was to exact revenge as the deceased had fired him from his job as a security guard. Nevertheless, SP1 denied all the allegations put to him.

[22] At the end of the prosecution's case, the learned Judicial Commissioner ('JC') found no issue with the identity of the deceased. She also found that the evidence of the pathologist (SP3, Dr. Siti Zanariah binti Md. Naziri) regarding the nature of the injuries found on the person of the deceased particularly those on his head, showed that the deceased was slashed with the intention of causing his death.

[23] The learned JC also found that the evidence of SP1 and SP2 was not shaken or broken in any way and going by their evidence it was established that it was the first appellant who had slashed the deceased to death.

[24] The learned JC also found that there was sufficient evidence that the first appellant had slashed the deceased to death in furtherance of the common intention between him and the second appellant to kill the deceased.

[25] Finally, the learned JC ruled that on a maximum evaluation of the evidence as adduced, the prosecution had established a *prima facie* case against both the appellants, which if left unrebutted, would warrant their convictions.

The Defence Of The First Appellant

[26] The first appellant gave evidence on oath.

[27] The first appellant said that at the material time, he was working for the second appellant, who was in the business of buying and selling scrap metal.

[28] He agreed that SP1 had picked him up that morning from his house and took him to Nashmeer Restaurant and thereafter SP1 picked up the second appellant.

[29] The first appellant said that he and the second appellant had come to Klebang Restu to meet a scrap metal supplier. Whilst they were having a meal at the restaurant, he saw the deceased circling around the restaurant on his motorcycle.

[30] He then heard the second appellant asked SP1 if he had a parang. SP1 replied he did. SP1 then telephoned SP2 to bring a knife to the restaurant.

[31] When SP2 came to the restaurant, SP1 asked him if he had brought a knife, to which SP2 replied affirmatively.

[32] Then he heard them plotting to kill the deceased. He panicked and excused himself by going to the toilet. When he came out, he heard the deceased shouting for help and running to the back of the restaurant which opened to the back lane.

[33] The first appellant said he went to the back lane and saw the second appellant and SP1 slashing the deceased. He was shocked and asked SP2 to send him home.

[34] That same night, the second appellant came to his house and warned him that if he reported the matter, he would suffer the same fate as the deceased. It was for this reason that he had not put his version to SP1 and SP2 during cross-examination.

[35] The other reason for not doing so was because of one Moses, a fellow inmate in Taiping prison, who had assaulted him at the behest of the second appellant and warned him not to implicate the second appellant during the trial. One Sjn. Mazlan from Taiping prison was aware of the same and would be able to confirm it.

[36] The first appellant further alleged that he has been falsely implicated by the investigating officer (SP7, ASP Nirmala a/p Arumugam) because of an incident involving her husband and himself. SP7's husband had on one occasion came over to his house and shouted abuses at his father over a pawn ticket. PW7's husband left his house when he approached him to beat him.

[37] The first appellant agreed with the narrative of the incident involving the smashing of the deceased's car windscreen as alluded by SP1. However, he said that it was the second appellant and SP1 who had shattered the said windscreen. He himself never did.

[38] The first appellant's father, SD2 (Rajagopal a/l Munisamy) testified that he and SP7's husband had a misunderstanding over some pawn ticket a few years ago and SP7 had falsely implicated his son with the murder of the deceased.

[39] Meanwhile, SD3 (Moses a/l Paramasivam) admitted that he had assaulted the first appellant at Taiping prison because the first appellant had uttered vulgarities at him. The assault has nothing to do with this case or that he was doing it upon the behest of the second appellant.

[40] Sergeant Mazlan bin Zakaria was subpoenaed but was not called to testify.

The Defence Of The Second Appellant

[41] The second appellant testified that he was a scrap metal dealer.

[42] He denied that he had slashed the deceased as alleged by the first appellant.

[43] He agreed that he was at the said restaurant with the first appellant, SP1 and SP2 after being picked up and brought to the restaurant by SP1 from the Mobil petrol station where he had earlier parked his lorry.

[44] He said he came to the restaurant to meet a scrap metal dealer that SP1 had arranged for him to meet. However, the scrap metal dealer did not show up.

[45] About half an hour later, he received a call from his customer, an Indonesian called Man. At about the same time, he saw the deceased riding a motorcycle in front of the restaurant.

[46] Then he left the restaurant together with the first appellant on SP1's motorcycle to meet his customer at a shop nearby. He bought copper wires from his customer and put it in a bag.

[47] Then, he realised that he had left his pouch containing his wallet at the restaurant. He went back to the restaurant to retrieve the pouch with the first appellant.

[48] On the way back to make payment to his customer, the first appellant asked to be dropped off near the Maybank premises in the vicinity.

[49] The second appellant further testified that after paying his customer, he went back to his lorry and left the bag containing copper wires therein. He came back about 10 minutes later but did not see the first appellant near the Maybank premises or at the restaurant.

[50] Instead, he heard a commotion coming from behind the restaurant. He went to the back lane on SP1's motorcycle and saw several people including SP1, SP2 and the first appellant there.

[51] He called out to the first appellant, who then came to him. He proceeded to the Mobil petrol station where his lorry was parked together with the first appellant. He took his lorry and went home and asked the first appellant to return the motorcycle to SP1.

[52] The second appellant admitted that three weeks prior to the deceased's murder, he had smashed the windscreen of the deceased's car. He also testified that in the same incident, the first appellant had used a knife to damage the same. He further denied that he had requested Moses to assault and threaten the first appellant.

[53] Put shortly, at the end of the hearing, the learned JC found that the defence of both the appellants had failed to raise a reasonable doubt upon the prosecution's case and correspondingly found that the prosecution had proven its case beyond a reasonable doubt against both the appellants.

[54] Hence, both the appellants were found guilty of committing the offence and were convicted of the same thereof and consequently both were sentenced to suffer the death penalty.

The First Appellant's Appeal

[55] The first appellant raised the following grounds:

(i) the learned JC erred in declining to allow learned counsel's application to recall SP1 and SP2 under s. 425 of the CPC; and upon such refusal further declined learned counsel's application to discharge himself from representing the first appellant;

(ii) the learned JC erred when she found that the badminton bag which was brought to the restaurant when both the appellants returned to the restaurant on SP1's motorcycle, contained the parang that was used to slash the deceased when in fact no evidence was adduced to indicate what was inside the said bag; and

(iii) SP1 was an interested witness and therefore unworthy of credit.

Our Decision

First Ground – The Learned JC's Refusal To Allow The Recalling Of Witnesses Under s. 425 Of The CPC

[56] Learned counsel for the first appellant submitted that one Ranjit Singh was earlier the counsel representing the first appellant until the conclusion of the testimonies of SP1 and SP2. The said Ranjit Singh then had applied to discharge himself for no apparent purpose and was allowed by the learned JC. Thereafter, Mr. M. Saravanan was appointed by the court to act for the first appellant. Mr. M. Saravanan then applied to recall SP1 and SP2 under s. 425 of the CPC, but was refused by the learned JC. Upon this refusal, the said Mr. M. Saravanan then applied to discharge himself. This application was also refused by the learned JC. Mr. M Saravanan went on to represent the first appellant until the conclusion of the trial. Learned counsel thus submitted that this had occasioned a great prejudice to no end to the first appellant.

[57] The event was captured in the notes of evidence at pp. 102, 103, vol 2, appeal record ('AR'). It shows, reproduced *in extenso*:

7 September 2016, 10.00 pagi

Harris Ong, Timbalan Pendakwa Raya (TPR) bagi pihak pendakwaan.

M. Saravanan untuk OKT1

Charan Singh untuk OKT2

Tertuduh-tertuduh hadir.

Perbicaraan bersambung.

Peguam OKT1:

Memohon untuk memanggil balik SP1 dan SP2 bagi pemeriksaan semula.

Mahkamah:

Apa soalan?

Peguam:

Saya tidak boleh beritahu mahkamah kerana nanti tiada elemen surprise.

A Mahkamah:

Permohonan ditolak.

Peguam:

Memandangkan permohonan saya telah ditolak, saya mohon untuk
B discharge myself.

Mahkamah:

Circular: Apabila seseorang peguam bela dan peguam cara telah menerima lantikan mahkamah, peguam bela dan peguam cara tersebut tidak boleh menarik diri dengan sewenang-wenangnya dari perlantikan tersebut.
C Sebarang permohonan untuk penarikan diri hendaklah dibuat di mahkamah terbuka.

Mahkamah:

Application is not allowed.

D **[58]** It is apparent from the transcript that Mr. M. Saravanan had refused to disclose the purported questions to be asked to warrant the recalling of SP1 and SP2 even though he was probed by the learned JC. Mr. M. Saravanan also did not advance any reason why he would want to recall SP1 and SP2.

[59] Section 425 of the CPC provides as follows:

E

> Any court may at any stage of any enquiry, trial or other proceeding under this code summon any person as witness, or examine any person in attendance though not summoned as a witness, or recall and reexamine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it
F essential to the just decision of the case.

[60] Learned counsel frankly agreed that the powers conferred to the court under s. 425 of the CPC, in particular, to recall and re-examine a witness already examined is discretionary in nature. As such, there must be some basis for the court to exercise its discretion, the main consideration being the
G essentiality of the additional evidence of the recalled witness to the just decision of the case. This must be so as the underlying jurisprudence of calling or summoning any person as a witness or the recalling and re-examining of any witness already examined under s. 425 of the CPC, must necessarily be anchored upon whether his evidence or additional evidence
H upon recall appears to be essential to the just decision of the case. Anything less will not be sufficient to meet the requirement under the said section.

[61] Hence, the section calls for grounds or reasons for the proper exercise of the said discretion to indicate that the recall and reexamination of the witness already examined appears to be essential to the just decision of the
I case.

[62] Now, the evidence showed that Mr. M. Saravanan did not proffer any grounds upon the need to recall SP1 and SP2, nor indicate the essentiality of the additional evidence of SP1 and SP2 upon recall to the just decision of the case. A

[63] Mr. M. Saravanan, when asked by the court, even declined to reveal the purported questions he intended to ask SP1 and SP2 upon grounds of secrecy. He wanted to spring a surprise or two upon all the parties including the court by keeping the questions up his sleeve. He told the court "... saya tidak boleh beritahu mahkamah nanti tiada elemen surprise ..." In our view, this is an outmoded strategy, totally out of sync with the law and practise. B

[64] It is our judgment that in such event, the learned JC did not err when she refused Mr. M. Saravanan's application to recall SP1 and SP2. Clearly, on the facts, she was devoid of any basis to exercise her discretion in favour of the first appellant. We have equally examined the notes of evidence pertaining to the testimonies given by SP1 and SP2 and found that the examination of both the said witnesses were sufficiently comprehensive and competently executed by both the prosecution and the defence. Both SP1 and SP2 were also thoroughly cross-examined by the defence to the hilt, leaving no stones unturned. The correct questions were in place and both the appellants had in fact laid down their defence bare through the cross-examination of SP1 and SP2. The prosecution had also satisfactorily re-examined both SP1 and SP2 arising out of the cross-examination of both the witnesses. Hence, it is incumbent upon the learned counsel (Mr. M Saravanan) to indicate the essentiality of the need to recall and re-examine both SP1 and SP2 to the just decision of the case. Verily, Mr. M. Saravanan had failed to get the job done. C D E F

[65] We found support in the following passage in *PP v. Abdul Hamid* [1968] 1 LNS 98; [1969] 1 MLJ 53 at p. 54, as indicated to us by the learned DPP:

> No doubt section 425 of the Criminal Procedure Code gives a wide discretion to the Court to summon and examine any person to give evidence but this power, as has been reiterated by many authorities which I need not cite here, must be exercised with the outmost caution and only where as set out in the provisions, the evidence of that person appears to the Court essential to the just decision of the case. G

[66] Meanwhile, the Supreme Court in *PP v. Phon Nam* [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142, at p. 145, states the following as the governing provision: H

> Section 425 Criminal Procedure Code is clearly divided into two limbs, first: a discretionary provision which provides that the Court may, on an application, summon any person as a witness or recall and re-examine any person already examined at any stage of any inquiry, trial or other proceeding under the Code. In exercising the discretion under the first I

A limb, the Court clearly must proceed with utmost circumspection especially when there was likelihood of the fresh evidence proving to be prejudicial to the accused. Second: an imperative provision which requires the Court to do so where the Court is satisfied that the evidence to be summoned would appear to the Court to be essential to a just decision of the case. (See *Mohd. Azam v. Mohd. Iqbal PLD* 1984 Supreme Court 95 with the B corresponding section in the Pakistan Criminal Procedure Code).

[67] On account of the non-availability of any grounds or basis for the learned JC to exercise her discretion in favour of the first appellant, and in the absence of any indication of the essentiality to recall and re-examine both SP1 and SP2 to the just decision of the case, we opined that the learned JC C had not committed any error of law when she refused Mr. M. Saravanan's application to recall and re-examine both SP1 and SP2.

[68] We also opined that the learned JC did not commit any error of law when she refused to entertain Mr. M. Saravanan's application to discharge himself from representing the first appellant pursuant thereto. D

[69] Her Ladyship's refusal to allow Mr. M. Saravanan's application to recall and re-examine both SP1 and SP2 is no ground for Mr. M. Saravanan to discharge himself of his duties upon his appointment by the court to act as counsel for the first appellant, facing a capital offence. Her Ladyship had E aptly applied the terms of the circular regulating the appointment and conduct of counsel appointed by court in a criminal trial involving a capital offence.

Second Ground – Wrong Finding By The Learned JC That The Badminton Bag Contained The Parang Used To Slash The Deceased

F

[70] Learned counsel for the first appellant adopted the submission of learned counsel for the second appellant pertaining to the issue of what was inside the badminton bag.

[71] In respect of the same, the learned JC, after alluding to the rules G governing the application of s. 34 of the Penal Code ('PC') as postulated in *Adiswaran Tharumaputrintar v. PP & Other Appeals* [2014] 3 CLJ 813, found, as indicated in her ground of judgment (at p. 23, vol 1, AR), the following:

> Applying the principles here, the evidence of Kesavan and Anberson showed that though the first accused was the actual doer of the criminal H act in the present case, the second accused was also present and participated by assisting him in two ways. First, there was unchallenged evidence that prior to the murder, the first and second accused had left the restaurant for a short while and when they returned, they had a badminton bag with them. It was true that there was no direct evidence as to what was in the said bag, but the fact the murder took place soon I after they had returned, indicated it must have been the parang that was used to slash the deceased.

[72] In assessing the evidence of the second appellant, the learned JC had again alluded that the parang used to slash the deceased was brought to the restaurant in the badminton bag by both the appellants. Thus, at para 54, of her grounds of judgment (at p. 32, vol 1, AR) she found:

> ... As in the case of the first accused, having accepted, as I did, the testimony of Kesavan and Anberson, which affords proof that the second accused was at the back lane when the deceased was slashed, and the parang used to slash the deceased was brought to the restaurant in a badminton bag by the first and second accused. His defence must also fail.

[73] The said findings by the learned JC, nevertheless, came under heavy criticism by learned counsel. They contended that the finding that the parang used to slash the deceased was brought to the restaurant by both the appellants in a badminton bag was not supported by the evidence adduced. No witness testified that the badminton bag contained the parang. There was also no evidence that the said parang was ever inside the badminton bag. Both SP1 and SP2 also did not say that the parang was concealed inside the badminton bag that was taken to the restaurant by both the appellants. It was further contended that even if the learned JC had inferred that the parang was inside the badminton bag brought by both appellants, the inference was made without basis with no supporting evidence and therefore has no leg to stand on.

[74] It was also contended that the learned JC's reliance upon the deceased's son testimony (SP6, Sathivel a/l Gobinathan) that during the incident at Indah Water Seri Klebang, the first appellant was armed with a parang demonstrated that the appellants kept a parang in their lorry and had left the restaurant to bring it to attack the deceased, cannot be a safe inference in the absence of evidence that the badminton bag they brought to the restaurant contained the said parang.

[75] We were in agreement that no evidence was adduced that the said badminton bag brought by both the appellants to the said restaurant contained the parang that was used to slash the deceased. We also agreed that the evidence is insufficient to safely make an inference that the said badminton bag contained the parang used to slash the deceased. Hence, we were in agreement with counsel's submission that the finding by the learned JC that the parang used to slash the deceased was brought by both the appellants to the restaurant was erroneous as it was not supported by the evidence adduced. Therefore, the said finding cannot be sustained.

[76] However, notwithstanding that the finding by the learned JC that the parang used to slash the deceased was inside the badminton bag was erroneous and cannot be sustained, it does not detract the fact that the deceased was slashed to death by the first appellant using a parang. He was seen slashing the deceased with a parang by both SP1 and SP2. In fact, SP1

saw the deceased running into the restaurant shouting "tolong! tolong" and was pursued by the first appellant wielding a parang. SP1 saw the deceased exited the restaurant through the back door into the back lane. At the back lane SP1 saw the first appellant strike two blows on the deceased's hand with the parang, whilst the second appellant sat on the motorcycle and watched the attack. Earlier, SP1 had seen the second appellant riding his (SP1's) motorcycle and went past the restaurant towards the back lane.

[77] SP2 corroborated SP1's evidence in material particulars.

[78] There is no reason to treat the testimonies of SP1 and SP2 with suspect. Equally there is no reason to reject their testimonies. The learned JC who had seen and heard the two witnesses testifying before her, found no merit in the contention of the first appellant that SP1 and SP2 were unreliable witnesses whose evidence ought to be rejected. Equally, she found no merit in the contention that they had a motive to falsely implicate the first appellant to exonerate themselves. The learned JC also found that the evidence of SP1 and SP2 was not shaken or broken in anyway during their cross-examination. These were the factual findings of the learned trial judge on the credit worthiness of the witnesses (SP1 and SP2) testifying before her. It is absolutely within her domain and we have no business to find otherwise unless it is shown that such findings is plainly perverse, unsustainable and not supported by the evidence adduced.

[79] In addition, the evidence of SP1 and SP2 that the first appellant had slashed the deceased using a parang was amply supported by the medical evidence.

[80] The pathologist (SP3) performed the autopsy on the deceased. She found 19 injuries on the deceased's person consisting of four deep slash or chop wounds and the rest were superficial incisive wounds. The four chop wounds were on the deceased's head, two of which were deep and penetrating. The defensive injuries to both the deceased arms were deep and had severed his arteries and fractured the bones in both his hands. SP3 opined that the deceased had died from excessive bleeding from these slash wounds which could have been caused by a sharp object, the like of a parang.

[81] From the narrative of the investigation conducted by SP3, clearly there can be no doubt that a parang was used to slash the deceased to his death.

[82] On the facts, we opined that the failure to adduce evidence regarding the contents of the said badminton bag, in particular whether the parang that was used to slash the deceased was inside the said bag, has not created any material gap upon the prosecution's case.

[83] Hence, we found that the erroneous finding by the learned JC that the parang that was used to slash the deceased was brought to the restaurant in a badminton bag by the first and second appellants appeared to be of no consequence in so far as the conviction against the first appellant is concerned.

Third Ground – SP1 Was An Interested Witness

[84] Learned counsel for the first appellant submitted that SP1 is an interested witness. He had all the motive to end the deceased's life in revenge of the deceased's temerity in blaming him (SP1) for the incident involving the shattering of the windscreen of the car belonging to the deceased which occurred about three weeks earlier and the consequential termination of his employment as security guard with the deceased company. All the more so when the SP1 disappeared from the scene and fled his home immediately after the murder incident to Rawang and was arrested only weeks later. It was squarely put to SP1 that he had slashed the deceased to death.

[85] In all the circumstances of the case, in our judgment, SP1 is not an interested witness. He was a mere bystander who witnessed the commission of the offence (slashing of the deceased) perpetrated by the first appellant, and who happened to be in the company of both the appellants and SP2 before the offence was committed.

[86] It is true that it was put to SP1 by the first appellant's learned counsel that he and the SP2 were the real culprits who had slashed the deceased. However, the allegation was denied by SP1. In our view, the denial is no mere rhetoric. It does carry a ring of truth as there is no evidence to connect him with the slashing of the deceased to death. Even the second appellant did not say that it was SP1 who had slashed the deceased.

[87] It is also true that SP1 had agreed that three weeks before the murder of the deceased, there had been an incident involving the smashing of the windscreen of the deceased's car by both the appellants and others aligned to the appellants. SP6 (the deceased's son) had corroborated SP1's evidence that he did not participate in the smashing of the windscreen of the deceased's car. However, the deceased squarely blamed SP1 for the incident, resulting in the termination of his employment with the deceased. Nevertheless, SP1 testified that he was not perturbed by the said accusation and termination of his employment. He had no ill-feeling towards the deceased.

[88] We shared our empathy with him. The blame game and the termination of his employment thereafter appeared too trivial and remote a matter to propel him to undertake such a horrifying revenge against the deceased.

[89] Even if SP1 is an interested witness, he is still entitled to credence until cogent reason for disbelief can be advanced and admitted to prove otherwise. There is no legal presumption that an interested witness should not be believed – see *Balasingham v. Public Prosecutor* [1959] 1 LNS 8; [1959] 1 MLJ 193. Though the authorities also suggested that the evidence of an interested witness must be treated with caution, there is no rule of law requiring the trial judge to caution himself and make a specific ruling on the credibility of such witness – see *Rozmi Yusof v. PP* [2013] 4 CLJ 384; [2013] 5 MLJ 66; *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1, *Lim Boon San v. PP* [1967] 1 LNS 86; [1968] 2 MLJ 45, *Kumaran Sappani v. PP* [2011] 3 CLJ 251.

[90] Thus, the evidence of an interested witness will be assessed and weighed in the like manner as that of any other witness and will similarly be subjected to the vagaries of cross-examination. It is then the ensuing business of the trial judge to make a ruling at the end of the trial on the veracity of such witness and decide whether to reject or admit his evidence in whole or in part.

[91] The learned JC, having seen and heard SP1 and SP2 giving evidence, ruled at the end of the trial (at p. 30, vol. 1, AR) that:

> I was completely satisfied that the testimony of Kesavan and Anberson was that of witnesses of truth. Having seen them give their evidence, and having observed their demeanour, especially under cross-examination and having tested it against the totality of the evidence, I was satisfied that they were telling the truth about what they had witnessed. They had no reason to falsely implicate the first and second accused.

[92] Again, sitting in an appellate capacity, we were in no position to disagree or dispute the learned JC's assessment of the creditworthiness of both SP1 and SP2. As such, there is no reason to reject their evidence or to treat their evidence with suspicion.

Conclusion

[93] For all the reasons given, we dismissed the first appellant's appeal and affirmed the conviction and sentence handed down upon him by the High Court.

The Second Appellant's Appeal

[94] Learned counsel for the second appellant premised his client's appeal principally upon the want of evidence that the first appellant had slashed the deceased in furtherance of the common intention between him and the second appellant under s. 34 of the Penal Code ('PC') to murder the deceased.

[95] At the end of the prosecution's case, the learned JC, after applying the principles of the law on common intention as alluded by the Federal Court in *Adiswaran Tharumaputrintar v. PP & Other Appeals (supra)* stated that the evidence of SP1 and SP2 showed that although the first appellant was the actual doer of the criminal act, the second appellant was also present and participated by assisting him in two ways:

(i) there was the unchallenged evidence that prior to the murder, both appellants had left the restaurant for a short while and when they returned, they had a badminton bag with them. Although there was no direct evidence as to what was in the said bag, but the fact that the murder took place soon after they had returned, indicated it must have been the parang that was used to slash the deceased; and

(ii) the second appellant also assisted the first appellant to flee the crime scene on SP1's motorcycle. The parang that was used in the commission of the offence was not found at the crime scene. This indicated that it was taken away by the first appellant.

[96] We have intimated earlier that the finding of the learned JC that the parang used to slash the deceased was in the badminton bag was not supported by the evidence adduced and hence, cannot be sustained. In such event there is no longer any link between the said parang used by the first appellant in the commission of the offence with the act or conduct of the second appellant anymore to indicate the second appellant's participation in the crime.

[97] There is equally no evidence that the second appellant had assisted the first appellant to flee the scene. No witness had testified that the second appellant had assisted the first appellant to flee the scene. Even the learned DPP agreed that there is no evidence as to how the first appellant had fled the scene of crime. As such, there is again no evidence to suggest that second appellant had acted in concert with the first appellant in furtherance of their common intention to murder the deceased by assisting the first appellant to flee the scene.

[98] On these grounds alone, we had allowed the second appellant's appeal. Thus his conviction and sentence as handed down by the learned JC is set aside and substituted with an order of acquittal and discharge.